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NOTES ON CONSIDERATION.

THE true theory of consideration is still so imperfectly apprehended that a noteworthy difference of opinion between masters in the subject[1] remains unexplained. I shall not undertake the rash task of adding to the learning on the subject; but I may perhaps be able to indicate how far they really differ, and to examine with somewhat greater particularity the actual decisions upon the point.

Professor Ames defines consideration as "any act or forbearance or promise by one person given in exchange for the promise of another."[2] He does not, however, assert that every promise made upon such consideration is binding; the law may still refuse to annex an obligation to the promise. This he states to be the case when "public policy" (a somewhat vague term for further elucidation of which we must turn to the cases) forbids the obligation.[3] Professor Williston, too, defines consideration as "something given by the promisee in exchange for the promise."[4] He afterwards adds to this a new requirement for a "sufficient consideration"[5] or a "valid consideration,"[6] the requirement of legal detriment. The

[1] Successive Promises of the same Performance, by Samuel Williston, 8 HARV. L. REV. 27; Two Theories of Consideration, by James Barr Ames, 12 HARV. L. REV. 515, 13 *ibid.* 29.

[2] 12 HARV. L. REV. 576.

[3] *Ibid.*

[4] 8 HARV. L. REV. 33.

[5] *Ibid.* p. 36.

[6] *Ibid.* p. 38.

difference between the two views does not lie in the conception of consideration; one holds that though a promise have a consideration, the consideration may not be sufficient, and therefore the law will impose no liability; while the other asserts that though there is consideration, the promise will, if public policy so requires, not be binding.

These differences of statement have led the two authorities to a different result where the consideration of an agreement is the performance of a previously existing obligation. Doing what one is bound to do is not a good consideration, says Professor Williston;[1] while Professor Ames sees in general no public policy against holding one to his promise made on such consideration.[2]

Perhaps these results do not follow necessarily from the principles stated. The ordinary rule approved by Professor Williston may be too broadly stated; while, on the other hand, it may well be urged that there is in some cases a sound objection to permitting the purchase of a promise by the doing of an act already due upon another obligation. Each, it may be, goes beyond the authorities and beyond the necessity of his argument. Let us examine further two of the questions involved.

1. Performance of a contractual duty as a consideration.

Professor Ames has sufficiently proved that in some cases such performance may be a valid consideration for a contract; yet in most cases the authorities clearly hold that it is not. To lay down, as is usually done, a general rule that such performance is or is not a valid consideration is, therefore, unsound. On what ground can we deny validity to this consideration?

Suppose A has already bound himself, absolutely and without the right to further payment for it, to do an act. B (whether the other party to the former obligation or a third party) now offers A a new promise in consideration of doing the act; and A does it. One thing or the other must be true: either A does the act entirely to fulfil his former obligation, as we have assumed he legally ought to do, or he does it partly or entirely to earn the new promise, as by hypothesis he legally ought not to do. If the former is true, he has not performed the consideration for the new promise. If the latter is true, he is attempting to secure a new right by means of a breach of duty — surely, according to Professor Ames's view,

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[1] 8 HARV. L. REV. 33.

[2] 12 HARV. L. REV. 515 (*passim*).

a thing contrary to public policy.[1] On any theory, therefore, the new promise should not be held binding.[2]

This is admitted to be the result of substantially all the modern authorities, at least in America. The performance of a prior legal duty to the same party cannot be made a consideration to bind an additional promise by the same party.[3] Upon this principle (whatever may have been the ground of the earlier decisions) the cases are now supported which hold that the payment or part payment of a debt is not consideration sufficient to support a promise given to secure such payment,[4] as for instance a promise to extend the time for payment of the balance.[5]

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[1] By this I do not mean that it is unfair to accept the new promise or to hope for its fulfilment. The wrong, if it exists, lies in treating the new promise as a bargain for which consideration has been given and which the other must therefore keep. Public policy forbids the promisee to treat the promise as an agreement on consideration instead of a mere gift.

[2] "The reason why the doing what a man is already bound to do is no consideration is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive." BYLES, J., in Shadwell *v.* Shadwell, 30 L. J. N. S. C. P. 145.

[3] Stilk *v.* Myrick, 2 Camp. 317; Harris *v.* Carter, 23 L. J. N. S. Q. B. 296; Peelman *v.* Peelman, 4 Ind. 612; Ritenour *v.* Mathews, 42 Ind. 7; Smith *v.* Boruff, 75 Ind. 412; Eastman *v.* Miller, 113 Ia. 404, 85 N. W. Rep. 635; Proctor *v.* Keith, 12 B. Mon. 252; Eblin *v.* Miller, 78 Ky. 371; Machine Co. *v.* Pringle, 41 Neb. 265, 59 N. W. Rep. 804; Hasbrouck *v.* Winkler, 48 N. J. Law 431, 6 Atl. Rep. 22; Bartlett *v.* Wyman, 14 Johns. 260; Robinson *v.* Jewett, 116 N. Y. 40, 22 N. E. Rep. 224; Carpenter *v.* Taylor, 164 N. Y. 171, 58 N. E. Rep. 53; Far Rockaway Bank *v.* Smith, 63 N. Y. App. Div. 432, 71 N. Y. Supp. 518; Bloodgood *v.* Wuest, 69 N. Y. App. Div. 356, 74 N. Y. Supp. 913; Schneider *v.* Heinsheimer, 26 N. Y. Misc. 11, 55 N. Y. Supp. 630; Chilson *v.* Bank, 9 N. Dak. 96, 81 N. W. Rep. 33; Moyer *v.* Kirby, 2 Pears. 64; Kenigsberger *v.* Wingate, 31 Tex. 42; Jones *v.* Risley, 32 S. W. Rep. 1027 (Tex.); Lewis *v.* McReavy, 7 Wash. 294; Foster *v.* Glenowlan Shale Co., 16 N. S. W. L. R. (Eq.) 59.

[4] Foakes *v.* Beer, 9 App. Cas. 605; Skinner *v.* Garnett G. M. Co., 96 Fed. Rep. 735; Bush *v.* Rawlins, 89 Ga. 117, 14 S. E. Rep. 886; Phœnix Co. *v.* Rink, 110 Ill. 538; Beaver *v.* Fulp, 136 Ind. 595; Abbott *v.* Tucker, 4 All. 72; Potter *v.* Green, 6 Allen 442; Warren *v.* Hodge, 121 Mass. 106; Lathrop *v.* Page, 129 Mass. 19; Weber *v.* Couch, 134 Mass. 26; Bowditch *v.* Chickering, 139 Mass. 283, 30 N. E. Rep. 92; Willis *v.* Grammill, 67 Mo. 730; Tucker *v.* Bartle, 85 Mo. 114; Harrison *v.* Wilcox, 2 Johns. 448; Bendix *v.* Ayers, 21 N. Y. App. Div. 570, 48 N. Y. Supp. 211; Roberts *v.* First Nat. Bk., 8 N. D. 474, 79 N. W. Rep. 993; Brockley *v.* Brockley, 122 Pa. St. 1; Martin *v.* Frantz, 127 Pa. St. 389, 18 Atl. Rep. 20; Rehm *v.* Frank, 16 Pa. Super. 175; Smith *v.* Phillips, 77 Va. 548.

[5] Cowlin *v.* Cook, Noy 83, Latch 151, Poph. 183; Deacon *v.* Gridley, 15 C. B. 294; Liening *v.* Gould, 13 Cal. 598; Holliday *v.* Poole, 77 Ga. 159; Shook *v.* Board of Commissioners, 6 Ind. 461; Hume *v.* Mazelin, 84 Ind. 574; Smith *v.* Bartholemew, 1 Met. 276; Price *v.* Cannon, 3 Mo. 453; Nightingale *v.* Meginnis, 34 N. J. Law 461; Parmelee *v.* Thompson, 45 N. Y. 58; Mutual Life Ins. Co. *v.* Aldrich, 44 N. Y. App. Div. 620, 60 N. Y. Supp. 195; Turnbull *v.* Brock, 31 Oh. St. 649.

It is to be noticed, however, that if the consideration includes not only the legal duty, but also something beyond, it will support the new promise. Thus, a promise to pay a seaman money if he would become a hostage is binding if he does so, since it is not part of a seaman's duty to become a hostage.[1] So if a party would be relieved from his obligation by a court of equity his performance of it might be a good consideration.[2] Upon this principle it is held that the payment of a debt at a certain time or in a certain way not required by law is a sufficient consideration to bind a promise of the creditor. Thus it is sufficient consideration to pay before maturity,[3] or to pay by giving a chattel instead of money,[4] or a negotiable promissory note of a third party,[5] or even of the debtor himself.[6] So giving new security is sufficient consideration.[7]

There is no difference in principle whether the prior duty is owed to the new promisor or to another; the same arguments prove that its performance cannot be sufficient consideration to bind the new promise. It is accordingly held in such cases that the performance of a prior legal duty to a third person cannot be a good consideration.[8]

It has sometimes been urged that two important English cases lay down a different rule. In Shadwell *v.* Shadwell[9] an uncle offered his nephew an allowance upon his marrying a woman whom he had contracted to marry. The object of the offer appears to have been the encouragement of an immediate marriage; the con-

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[1] Yates *v.* Hall, 1 T. R. 73.

[2] Greenliff *v.* Baker, 1 Leon. 238, pl. 317; Hubbard *v.* Farrer, 1 Vin. Abr. 306, pl. 17; Stewart *v.* Keteltas, 36 N. Y. 388.

[3] Flight *v.* Gresh, 8 Hutt. 76, Cro. Car. 8; Royal *v.* Lindsay, 15 Kan. 591.

[4] Foakes *v.* Beer, 9 App. Cas. 605 (*semble*); Day *v.* Gardner, 42 N. J. Eq. 199, 17 Atl. Rep. 365 (*semble*); Cox *v.* Seeley, 28 N. Sc. 210 (aff'd by the Supreme Court of Canada, Cont. Dig. 67). In Yeary *v.* Smith, 45 Tex. 56, 72, it seems to be required, contrary to the general opinion, that the chattel must be worth more than the debt.

[5] Luddington *v.* Bell, 77 N. Y. 138; Allison *v.* Abendroth, 108 N. Y. 138, 15 N. E. Rep. 606.

[6] Rees *v.* Berrington, 2 Ves. jr. 540; Curlewis *v.* Clark, 3 Ex. 375; see Russ *v.* Hobbs, 61 N. H. 93. But see *contra* Arend *v.* Smith, 151 N. Y. 502, 45 N. E. Rep. 872.

[7] Jaffray *v.* Davis, 124 N. Y. 164, 173, 26 N. E. Rep. 351.

[8] Westbie *v.* Cockayne, 1 Vin. Abr. 312, pl. 36; Johnson *v.* Seller, 33 Ala. 265; Harris *v.* Harris, 9 Col. App. 211, 47 Pac. Rep. 841; Schuler *v.* Myton, 48 Kan. 282, 29 Pac. Rep. 163; Holloway *v.* Rudy, 60 S. W. Rep. 650, 22 Ky. L. Rep. 1406; Putnam *v.* Woodbury, 68 Me. 58; Gordon *v.* Gordon, 56 N. H. 170; L'Amoreux *v.* Gould, 7 N. Y. 349 (*semble*); Gerlach *v.* Steinke (Super. Ct. Buffalo), 22 Alb. L. Jour. 134; Hanks *v.* Barron, 95 Tenn. 275, 32 S. W. Rep. 195; Davenport *v.* Congregational Society, 33 Wis. 387.

[9] 30 L. J. N. S. C. P. 145.

sideration was not the mere fulfilment, but the immediate fulfilment, before it was legally required, of the promise made to the woman. This was expressly required in a later similar case.[1] In another case of the sort the consideration was the making of "all pecuniary and necessary arrangements . . . to constitute a legal marriage." On its face this seems to call for a mere fulfilment of legal obligation; but the offer undoubtedly contemplated what was in fact done, that is, the drawing and execution of a marriage settlement, — a matter not required by the contract to marry.[2] The other case, often cited as one of this class, is Scotson *v.* Pegg.[3] In that case the consignee of goods in the hands of a carrier ordered him to deliver them to the defendant, whereupon the defendant "in consideration the [carrier] would deliver" the goods promised to unload the vessel quickly. Being sued on the promise, the defendant claimed there was no consideration, because the carrier was bound to the consignee to deliver to the defendant. On careful analysis the case appears to be one where the defendant's promise was made in consideration of the plaintiff's *promise* to deliver; the second contract, in other words, was bilateral. The declaration, to be sure, describes a unilateral contract, but such a contract seems impossible in this case. As delivery by a carrier and unloading are necessarily simultaneous, if delivery itself were the consideration it could be given only when the defendant fulfilled his promise; neither could be bound to a future act. This defect in the declaration was cured in the plea, which confessed "the said promise of the plaintiffs." Counsel for the defendant argued the case as one of alleged bilateral contract ("the plaintiffs were under a prior legal obligation to deliver the cargo, and therefore the promise to the defendant to do the same thing was void"), and the court proceeded on that supposition, Wilde, B., saying: "I accede to the proposition that if a person contracts with another to do a certain thing he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make *a valid promise* to another to do the same thing." The italics are those of the present writer.

Where there is no obligation to perform the prior contract, as for instance because of the non-performance of a condition by the

[1] Skeete *v.* Silberburg, 11 T. L. R. 491.
[2] Chichester *v.* Cobb, 14 T. L. R. 433.
[3] 6 H. & N. 295.

other party, performance without insisting on the condition may, of course, be a good consideration.[1]

In all these cases the new promisee was bound to perform his old obligation without further compensation. It is quite possible, however, to make a promise or offer in contemplation of another promise or offer. If at the time the prior contract was made the agreement left a party free to get further compensation for his act, there would be no reason why he should not buy a new promise by the performance of the act. So where a bilateral agreement is made to guarantee a future sale by one party to a third party, the former may make a good contract of sale, though the consideration for it is the performance by the seller of his prior obligation, — he is doing what he is already bound to do.[2] If ten men offer A a thousand dollars each if he will build a church, it could hardly affect the liability of the nine to him if the tenth, before making his subscription, secured an agreement from A to build.

Though the prior contract was not made in contemplation of the second agreement, the latter may be binding. If the offer for the second unilateral agreement was made before the bilateral contract and in contemplation of it, the performance of the bilateral contract may properly be made a valid consideration. Thus where a master of a vessel of war offered a man extra compensation if he would serve as cook on his vessel, the cook had a legal right to the extra wages though the consideration for them was a service he had bound himself to render, by signing the shipping articles, before he earned the wages.[3]

These last cases are not exceptions to a general rule. They are uncommon but not exceptional cases where it is not contrary to a man's duty to earn a second promise by the performance of his contract. Where that is the case, since there is a consideration for the second promise and the consideration is not invalid (to use Professor Williston's term) or contrary to public policy (to use Professor Ames's), the second promise is binding. It may perhaps be laid down generally that if the offer for either the bilateral or the unilateral agreement, made while the offeree was bound by neither agreement, contemplated the making of both agreements, then both are binding.

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[1] Brownlee *v.* Lowe, 117 Ind. 420.

[2] See Martin *v.* Wright, 6 Q. B. 917; Lawrie *v.* Scholefield, L. R. 4 C. P. 622; Frost *v.* Weatherbee, 23 S. C. 354.

[3] Clutterbuck *v.* Coffin, 3 M. & G. 842. *Accord*, Corrigan *v.* Detsch, 61 Mo. 290.

2. Promise to perform a contractual duty as a consideration.

That a promise is an act, and therefore if requested as a consideration should be dealt with like any other act, seems clear.[1] But it is necessary to consider with some care what is meant by the request for a promise. The thing desired is certainly not merely the utterance of certain words; it is rather the expression of assent to an agreement.[2] While to promise does not mean to make a contract — a contract is the act of the law — it does mean to come into an agreement, which is a mere act of the parties.[3]

Suppose now A and B are already bound by an agreement, and B offers a new promise to A if A will promise to perform his original agreement; A renews his prior promise. If he has continued constant to his former agreement, this is the mere reciting of words, not expressing assent to an agreement; the parties are where they were before,[4] no act has been done in any fair sense, and B's new promise is without consideration. If on the other hand A has unlawfully withdrawn from his obligation by expressing his refusal to carry it out, he is legally bound to reconsider and carry out his obligation without further consideration, and as in the cases already considered it would be (to use Professor Ames's term) against public policy to allow him to obtain a new contract by means of persisting in wrong; while therefore to renew his assent to the agreement would be a consideration, it would not be sufficient to make the other's promise binding. In accordance with this view, a promise to perform a prior contract is not a good consideration for a new promise by the other party to the contract.[5] So a promise to extend the time for payment of a debt in consideration of the promise to pay it is not binding;[6] nor is such

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[1] 13 HARV. L. REV. 31.

[2] See Evans *v.* Hooper, 1 Q. B. D. 45.

[3] 13 HARV. L. REV. 32.

[4] "Such a promise, which leaves the legal rights of the parties just where they are, creates no cause of action." MAULE, J., in Deacon *v.* Gridley, 15 C. B. 295, 309. See also Lingenfelder *v.* Wainwright Brewing Co., 103 Mo. 578, 15 S. W. Rep. 844; Miner *v.* Overseers of the Poor, 104 Pa. 317; Runnamaker *v.* Cordray, 54 Ill. 303; but see Devine *v.* Murphy, 168 Mass. 250, 46 N. E. Rep. 1066.

[5] Bayley *v.* Homan, 3 B. N. C. 915, 921; Mallalieu *v.* Hodgson, 16 Q. B. 689; Jackson *v.* Corbin, 8 M. & W. 790; Sullivan *v.* Sullivan, 99 Cal. 187, 33 Pac. Rep. 862; Davis *v.* Morgan (Ga.), 43 S. W. Rep. 732; Goldsbrough *v.* Gable, 140 Ill. 269, 29 N. E. Rep. 722; Fensler *v.* Prather, 43 Ind. 119; Roehrs *v.* Timmons, 28 Ind. App. 578, 63 N. E. Rep. 481; Early *v.* Burt, 68 Ia. 716; Wescott *v.* Mitchell, 95 Me. 377, 50 Atl. Rep. 21; Wendover *v.* Baker, 121 Mo. 273, 25 S. W. Rep. 918; Schneider *v.* Heinsheimer, 26 N. Y. Misc. 11, 55 N. Y. Supp. 630.

[6] Abel *v.* Alexander, 45 Ind. 523; Dare *v.* Hall, 70 Ind. 545; Jennings *v.* Chase, 10 Allen 526; Kern *v.* Andrews, 59 Miss. 39; Allen *v.* Plasmeyere (Neb.), 90 N. W. Rep. 1125; Stickler *v.* Giles, 9 Wash. 147, 37 Pac. Rep. 293.

promise to pay a sufficient consideration for any other promise.[1] So an agreement to pay out of specified assets is not sufficient consideration, since the debtor is already bound to pay out of any assets.[2]

But here, as in the case formerly considered, if the promise given as consideration includes anything beyond the existing duty the new contract is binding. Thus where a surety on a tenant's contract to pay rent and repair promised after default to pay rent and repair, this was sufficient consideration to bind the landlord's promise, since the surety was not bound personally to make repairs.[3] And where bail, having the right to surrender his principal, agreed to pay if the creditor would extend the time, the creditor's promise to do so was binding, since the other was not bound to pay if he surrendered his principal.[4]

On the same principle a bilateral agreement, by the creditor to extend the time for payment until a certain day, and by the debtor to pay interest until that time, is binding, since the debtor thereby gives up his right to pay before the time and thus stop the running of interest.[5]

In a very few jurisdictions it appears to be held that where two parties, being bound by an executory bilateral contract, agree to modify it or to remake it with an addition, the promise on one side being unchanged and on the other increased, the new agreement is binding.[6] On the other hand in most jurisdictions it is

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[1] Solary *v.* Stultz, 22 Fla. 263; Titsworth *v.* Hyde, 54 Ill. 386; Jennings *v.* Neville, 180 Ill. 270, 54 N. E. Rep. 202; Harrison *v.* Cassady, 107 Ind. 158; Specialty Glass Co. *v.* Daley, 172 Mass. 460, 52 N. E. Rep. 633; Keffer *v.* Grayson, 76 Va. 517.

[2] Ford *v.* Garner, 15 Ind. 298; Grover *v.* Hoppock, 2 Dutch. 198; but see Lamkin *v.* Palmer, 164 N. Y. 201, 58 N. E. 123. So of an executor's promise to pay out of the assets of the estate. Philpot *v.* Briant, 4 Bing. 717, 721.

[3] Morris *v.* Badger, Palm. 168, 189.

[4] Thomson *v.* Way, 172 Mass. 423, 52 N. E. Rep. 525. This appears to have been overlooked in Holmes *v.* Boyd, 90 Ind. 332.

[5] Rees *v.* Barrington, 2 Ves. jr. 540; Stallings *v.* Johnson, 27 Ga. 564; Reynolds *v.* Barnard, 36 Ill. App. 218; Alley *v.* Hopkins, 98 Ky. 668; Chute *v.* Pattee, 37 Me. 102; Simpson *v.* Evans, 44 Minn. 419, 46 N. W. Rep. 908; Moore *v.* Redding, 69 Miss. 841; Fowler *v.* Brooks, 13 N. H. 240; McComb *v.* Kittridge, 14 Oh. St. 348; Fawcett *v.* Freshwater, 31 Oh. St. 637; Benson *v.* Phipps, 87 Tex. 578. In Wilson *v.* Powers, 130 Mass. 127, the general doctrine was recognized, but the court was unable to find any agreement of the debtor to refrain from paying the debt and to pay interest throughout the new term. *Contra*, Abel *v.* Alexander, 45 Ind. 523; Dare *v.* Hall, 70 Ind. 545; Hale *v.* Forbis, 3 Mont. 395; Kellogg *v.* Olmsted, 25 N. Y. 189; Olmstead *v.* Latimer, 158 N. Y. 313, 53 N. E. Rep. 5.

[6] Stoudenmeier *v.* Williamson, 29 Ala. 558; Connelly *v.* Devoe, 37 Conn. 570; Holmes *v.* Doane, 9 Cush. 135; Peck *v.* Requa, 13 Gray, 407; Rollins *v.* Marsh, 128

held that the old contract continues in force, since there was not sufficient consideration to make the new agreement binding.[1]

Several cases, which are often cited as examples of the doctrine in question, really rest upon a different ground. The original Massachusetts decision, to which all the later Massachusetts cases as well as the others which take the same view go back, is of this sort. The parties had agreed, the one to build a house, the other to pay a certain amount for it. The parties then agreed to waive the contract price, and the owner agreed to pay what it was worth. The new promise was held binding.[2] The consideration was, however, not the builder's promise to complete, but his agreement to give up his right to the contract price, which might have exceeded the value of the work.[3] In other cases it has been held that if the agreement is legally terminated so that neither side is bound, it is

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Mass. 116; Rogers *v.* Rogers, 139 Mass. 440, 1 N. E. Rep. 122; Thomas *v.* Barnes, 156 Mass. 581, 584, 31 N. E. Rep. 683; Foley *v.* Storrie, 4 Tex. Civ. App. 377, 23 S. W. Rep. 442; Lawrence *v.* Davey, 28 Vt. 264. It will be noticed that no court of last resort except the Supreme Court of Massachusetts has recently so held. On the contrary, while in several states there were earlier decisions the same way (Bishop *v.* Busse, 69 Ill. 403; Cooke *v.* Murphy, 70 Ill. 96; Coyner *v.* Lynde, 10 Ind. 282; Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Goebel *v.* Linn, 47 Mich. 489; Conkling *v.* Tuttle, 52 Mich. 630; Meech *v.* Buffalo, 29 N. Y. 198), these decisions were subsequently overruled, and the law of these states brought into accord with the general common law. Havana Press-Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. Rep. 873; Moran *v.* Peace, 72 Ill. App. 135 (but see Hirsch *v.* Chicago Carpet Co., 82 Ill. App. 234); Reeves Pulley Co. *v.* Jewell Belting Co., 102 Ill. App. 375; Reynolds *v.* Nugent, 25 Ind. 328; Widiman *v.* Brown, 83 Mich. 241, 47 N. W. Rep. 231; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Alley *v.* Turck, 8 N. Y. App. Div. 50, 52, 40 N. Y. Supp. 433 (*semble*); Jughardt *v.* Reynolds, 68 N. Y. App. Div. 171, 74 N. Y. Supp. 152.

In view of the recent current of authority, it may be doubted whether the doctrine stated is law outside of Massachusetts. Of the other jurisdictions from which cases in support of it were cited, there is in Alabama, Connecticut, and Vermont only a single early decision; the other jurisdiction, Texas, is represented by an inferior court only.

[1] Harris *v.* Watson, Pea. N. P. 72; Stilk *v.* Myrick, 2 Camp. 317; Frazer *v.* Hatton, 2 C. B. N. S. 512, 524; Harris *v.* Carter, 3 E. & B. 559; Alaska Packers' Assoc. *v.* Domenico, 117 Fed. 99 (reversing 112 Fed. 554); Blythe *v.* Robinson, 104 Cal. 239, 37 Pac. Rep. 904; Havana Press-Drill Co. *v.* Ashurst, 148 Ill. 115, 35 N. E. Rep. 873; Moran *v.* Peace, 72 Ill. App. 135; Reynolds *v.* Nugent, 25 Ind. 328; Ayres *v.* C. R. I. & P. R. R., 52 Ia. 478; McCarty *v.* Hampden Assoc., 61 Ia. 287; Widiman *v.* Brown, 83 Mich. 241, 47 N. W. Rep. 231; King *v.* Duluth Co., 61 Minn. 482, 63 N. W. Rep. 1105; Lingenfelder *v.* Wainwright, 103 Mo. 578, 15 S. W. Rep. 844; Conover *v.* Stillwell, 34 N. J. Law 54; Vanderbilt *v.* Schreyer, 91 N. Y. 392; Festerman *v.* Parker, 10 Ired. 474; Gaar *v.* Green, 6 N. Dak. 48, 68 N. W. Rep. 218; Robb *v.* Mann, 11 Pa. St. 300; Erb *v* Brown, 69 Pa. St. 216; Nesbitt *v.* R. R., 2 Speers, 697, 709.

[2] Munroe *v.* Perkins, 9 Pick. 298.

[3] See to the same effect Cutter *v.* Cochrane, 116 Mass. 408.

then possible to make a new bilateral contract in such terms as the parties choose.[1] This is all the clearer if both sides of the new contract differ from those of the old.[2]

The new agreement is also binding where the party in whose favor the modification was made had a right to refuse to perform the first contract; as for instance, if he had a right to avoid it for misrepresentation or mistake,[3] or for non-performance of a condition,[4] or had a right by the terms of the contract to put an end to it upon notice.[5] So where he waived a right to delay performance.[6] And according to the general principle if one party *bona fide* claims the right to avoid, though that right is disputed, the relinquishment of the claim is sufficient consideration to make binding a promise by the other party.[7] The Massachusetts doctrine is obviously exceptional, and has been sufficiently criticised elsewhere.[8]

Where there is an existing contract with a third person, the objections just urged do not exist. The promise is necessarily an assent to a *new* agreement, and therefore may be a consideration; and while it is the duty of the party to keep his prior contract, he is under no duty to enter into an agreement with a third party to keep it. His agreement to keep the prior contract is therefore a good consideration for a new promise of a third party.[9]

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[1] Harris *v.* Carter, 3 E. & B. 559; Hart *v.* Lauman, 29 Barb. 410; Butler *v.* Publishing Co., 54 N. Y. App. Div. 382, 66 N. Y. Supp. 788.

[2] Harrod *v.* S., 24 Ind. App. 159, 55 N. E. Rep. 242.

[3] Bean *v.* Jay, 23 Me. 117; Osborn *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. Rep. 209; Keeney *v.* Mason, 49 Barb. 254.

[4] Grant *v.* Duluth Co., 61 Minn. 395, 63 N. W. Rep. 1026.

[5] Spangler *v.* Springer, 22 Pa. St. 454.

[6] King *v.* Duluth Co., 61 Minn. 482, 63 N. W. Rep. 1105.

[7] Michaud *v.* MacGregor, 61 Minn. 198, 63 N. W. Rep. 479.

[8] 8 HARV. L. REV. 30. To Professor Ames's reply, that the agreement should be supported unless it contravenes public policy, it may be answered first, for the reasons already given, such an agreement, being a breach of legal duty on the part of one party, always contravenes public policy; second, the ground of policy has been distinctly negatived by Lord Ellenboro in Stilk *v.* Myrick, 2 Camp. 317; third, that the authorities do not enforce such an agreement even in a case where the offer was made by the new promisor without solicitation by the benefited party (Frazer *v.* Hatton, 2 C. B. N. S. 512, 524); fourth, that most of the authorities which follow the Massachusetts doctrine confine it to cases where the benefited party has refused to go on, and thus made it necessary for the other to secure performance by the new promise; in other words, where the new promise has been obtained by coercion.

[9] Bagge *v.* Slade, 3 Bulst. 162; Goring *v.* Goring, Yelv. 11; Scotson *v.* Pegg, 6 H. & N. 295; Humes *v.* Decatur Co., 98 Ala. 461, 473; Merrick *v.* Giddings, 1 Mack. 394; Abbot *v.* Doane, 163 Mass. 433, 40 N. E. Rep. 197; Avondale Marble Co. *v.* Wiggins, 12 Pa. Super. 577; Cobb *v.* Cowdery, 40 Vt. 25; Green *v.* Kelley, 64 Vt. 309, 24 Atl. 133; Reynolds *v.* Jacobs, 10 N. S. W. L. R. 268. A dictum *contra* in Jones

Professor Williston, in the article referred to, while agreeing that the promise is a consideration, urges that it is not a valid consideration unless the thing promised would be a consideration (a detriment); and therefore that in neither case just discussed would there be a binding contract. For, he argues with great force, if the act itself would not be a detriment the promise to act can be no consideration; the promise cannot be more than the thing promised. If this is true, we have for the first time a necessary difference in result between the two theories of consideration.

Let us examine the position of the respective parties to the two agreements, and see whether it is true that a promise to act cannot be a greater or better consideration than the act itself. What does the promisee get by the promise? He gets the assurance to him, by reason of the agreement, that the thing will be done. He asks for the promise because he desires this assurance; and he gets by it what he gets in every case of bilateral agreement. It is true that the promisor would in all probability do the act in any case, as a result of his prior contract; but the promisee desires not probability but personal assurance. In an ordinary case a bilateral agreement is none the less binding because the promisor would probably have done the thing promised though the agreement had not been made. On the other side, what does the promisor give in the one case that he does not give in the other? He yields his assent to a new arrangement, comes into a new relation with a new party, gives another man such control over his acts and affairs as any agreement gives. After performance the position of the parties is the same, whether the promise is made or not; but

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v. Waite, 5 Bing. N. C. 341, 351, is of course overruled. Two or three American cases are or seem opposed to the general current of authority. If so, they are following a mistaken analogy; that is, they rest on cases where it is held that a promise to the other party to an obligation to perform it is no consideration. The first of these cases is Barrington *v.* Ryder, 93 N. W. Rep. 56 (Ia.). This case may perhaps rest upon a distinction between a good consideration to support a contract and a valuable consideration to validate a gift and prevent a resulting trust. Another case, Sherwin *v.* Brigham, 39 Oh. St. 137, is undoubtedly opposed to the current of authority. The plaintiff having signed certain notes for the accommodation of the defendant's brother, the defendant agreed to honor drafts to be drawn upon him by the plaintiff upon the plaintiff's agreement to use the money obtained from the drafts in paying the notes. The court held the promise of the defendant to be without consideration. The case is clearly wrong, apart from the question under discussion; for though the plaintiff was legally bound to pay the notes, he was not bound to pay them out of any particular fund, and his promise was therefore to do a thing which he was not already bound to do, even to a third party. *Dicta* to the same effect may be found in Ellison *v.* Water Co., 12 Cal. 542; Ford *v.* Crenshaw, 1 Litt. 68.

between offer and performance the position of the promisor is that of one who has agreed to insure his own act.

This view is perhaps strengthened by a class of cases where a promise is clearly a valid consideration, though performance would not be; cases, to wit, where one promises the happening of a future event over which he has no control. I agree that a horse which I sell shall be sound, or shall win a race; or that a man shall pay his debts; or that a ship shall come safe to port: in all these cases my promise is a valid consideration for a counter-promise. Yet the soundness or speed of the horse, the solvency of the third party, or the safety of the ship could not be a valid consideration for a promise made to me.

The distinction made by the decisions between a promise to a party to the existing obligation and one to a third party seems quite in accordance with the accepted notions of consideration and of obligation; and it is neither unfair nor impolitic. Nor is it an objection to the distinction that it has the support of Professors Langdell and Ames and of Sir Frederick Pollock.

Joseph H. Beale, Jr.